No. 11,545

IN THE

United States Court of Appeals

For the Ninth Circuit

Z. E. EAGLESTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

Appellee has filed herein a brief purporting to answer the points raised by appellant. In this closing brief appellant wishes to answer only such matters raised by appellee which appear to warrant a reply.

I.

FIRST POINT RAISED: THAT THE TRIAL COURT ERRED IN GIVING TO THE JURY INSTRUCTION 4D.

(a) Appellee erroneously assumes, as did the trial court, that there was no issue to go to the jury as to who provoked the altercation.

As pointed out in appellant's opening brief (p. 13) the trial court by stating:

> "It is no defense to the crime charged in the indictment, or to the included crime of assault, that Rowley may have voluntarily entered into a fight with the defendant, each attempting to hit and injure the other with his fists",

completely removed the issue of provocation and self-defense from the jury's consideration.

In his brief (pp. 6-8) appellee likewise assumes that there was no issue of provocation or self-defense in the case; that the evidence, without dispute, shows that the parties engaged in mutual combat, and that therefore the instruction was proper.

In so doing, both the trial court and appellee overlooked positive conflicting evidence as to who provoked the altercation and struck the first blow. In support of his position, appellee cites appellant's testimony at Record 417 to show that the first blows struck were struck "concurrently or simultaneously."

Appellee has entirely ignored the previous testimony of appellant at Record 416 which contains positive evidence as to who struck the first blow.

> "He stepped into the door there, and he continued to tell me: 'That is $150,' and I finally made the statement, I said: 'It is either $250 or nothing. Now don't call me a liar in my own house.'
> He stepped outside the door and said: 'You are a liar.'
> I said: 'Well, take off your glasses.'
> He took them off and laid them on a stove that is outside the door. We immediately stepped in

> —we started to sparring around. *He hit me three or four times, in the matter of a few seconds*— my wind wasn't very good. And then he kind of throwed up his left hand as he made a swing at me, and I hit him kind of a glancing blow on the left side as he turned around." (Italics ours.)

This testimony, even though it were uncorroborated, made it incumbent upon the trial court to submit the issues of provocation and self-defense to the jury for consideration under proper instructions.

> "A defendant, in a criminal prosecution for assault, is entitled to an instruction on self-defense, although his own testimony is the only testimony to support it."
>
> *State v. Robinson* (Mo.), 182 S.W. 113.

The authorities are practically unanimous in stating that where any evidence raises issues as to provocation or as to which of the parties was the aggressor, those issues must be determined by the jury.

In *Raines v. State,* 73 Ga. App. 177, 36 S.E. (2d) 64, 66, the parties engaged in a fight that involved name-calling, followed by assault with ice tongs and a whisky bottle, respectively. After discussing the evidence, the Supreme Court said:

> "We therefore hold that it was a question for the jury whether the prosecutor was the aggressor and without justification used opprobrious words attributed to him."

And in *Bynum v. State,* 28 Ala. App. 86, 179 So. 262, the Alabama court said:

> "The State's evidence tends to show that the assault was without provocation, while that for the defendant tended to prove self-defense. Both parties were drinking at the time, as were some of the witnesses. This condition probably accounts for the varying statements made by them as to what transpired. *In any event the evidence presents a jury question* * * *" (Italics ours.)

In *Smith v. State,* 15 Ala. App. 662, 74 So. 755, 756, the parties had an altercation arising out of a crap game. Concerning this situation, the Alabama court said:

> "The evidence is in conflict as to some of the details, but the tendencies were to show that after some words the parties arose from the ground, Smith started towards the door and as he passed by Sisk, Sisk grabbed Smith, throwing his left arm around his neck, crowding him back into a corner, and was striking him with his fist or a knife, when Smith shot him. The other tendencies were that when the dispute arose, Sisk called Smith a 'damn liar', Smith repeating the same epithet to Sisk, when they went together and a pistol was fired."

The trial court instructed as follows:

> "If you believe from all the evidence in this case, beyond a reasonable doubt, that Milton Smith, either by words or deed, provoked or encouraged the difficulty, then he cannot claim self-defense."

In holding this instruction erroneous, the reviewing court said (p. 756):

"The question as to whether the conduct of the accused is wrongful, and whether it brought on, provoked or encouraged the difficulty, is one of fact for the jury."

To the same effect:

Terry v. State, 15 Ala. App. 665, 74 So. 756, 758;

Hiett v. State, 75 Okla. Cr. 190, 129 Pac. (2d) 866;

Fontenot v. Tremie, 19 La. App. 67, 139 So. 558, 559;

Commonwealth v. Ashcraft, 224 Ky. 203, 5 S.W. (2d) 1067;

Harrison v. Commonwealth, 229 Ky. 471, 16 S.W. (2d) 471, 472.

Commonwealth v. Collberg and other cases cited by appellee in his brief (pp. 6, 7) clearly define "mutual combat" and its effect on a prosecution for assault and battery, but in none of those cases did the trial court, in giving its definition of mutual combat to the jury, attempt to deprive the jury of its prerogative of determining the issues of self-defense, provocation and which of the parties was the aggressor.

Each of these issues necessarily remains a jury question. None of them were submitted to the jury in the instant case. In fact, both the court's instruction and appellee's contention in his brief affirmatively remove these issues from the jury's consideration.

(b)(1) In discussing the court's Instruction 4D appellee completely omitted a vital part of Instruction 4D wherein the trial court wrongfully assumed that an assault had been committed by appellant.

Instruction 4D, as given by the trial court, reads as follows:

> "Even if you should believe that Rowley called the defendant a liar, in words or substance, on the day of and before the alleged commission of the crime charged in the indictment, the use of such words by Rowley and his application of them to the defendant would not justify an assault by the defendant upon Rowley, whether the defendant was or was not then armed with a dangerous weapon.
>
> It is no defense to the crime charged in the indictment, or to the included crime of assault, that Rowley may have voluntarily entered into a fight with the defendant, each attempting to hit and injure the other with his fists. The crime charged against the defendant in the indictment, and the included crime of assault, are offenses against the United States." (T.R. 11.)

Appellant made timely objection at the trial to the giving of this instruction. (T.R. 23.)

In the first paragraph of this instruction (as pointed out in appellant's opening brief, p. 15) the trial court clearly assumed and informed the jury that an assault had been committed by appellant upon appellee. *This vital paragraph is neither cited, quoted, nor discussed in appellee's brief.*

(b)(2) Appellee's explanation of the court's wrongful assumption that the parties engaged in mutual combat is not justified under the evidence. This issue was controverted and disputed and should have been resolved by the jury.

In discussing the second paragraph of the quoted instruction, supra, appellee, like the trial court, again assumes that there is no conflict in the evidence—that an *agreed* mutual combat was clearly established by uncontradicted evidence.

As pointed out in the preceding section of this brief, this contention is not in accord with the evidence, and the issues of mutual combat, provocation and self-defense should have been submitted to the jury.

The authorities cited on page 9 of appellee's brief for the proposition that mere words will not justify an assault and battery, are correct. Instead, however, of being used in defense of the instruction in question, these authorities should have been used by the trial court in setting forth an accurate statement of the law when submitting the issue of provocation to the jury.

On pages 10 and 11 of his brief, appellee argues that the charge of the trial court, taken as a whole, cures the errors contained in Instruction 4D. However, he cites no portion of the court's instructions that tends in any way to remove the wrongful assumption that an assault had been committed and that mutual combat existed—both of which issues should have been resolved by the jury. Appellee does quote a portion of the instruction in which the trial court admonished the jury to disregard any comments or opinions which the trial court may have expressed on

the facts, and he cites a number of cases (p. 11) purporting to hold that improper assumptions may be cured by instructions to disregard judicial comment on the facts. An examination of these cases, however, shows that they deal only with the effect of a trial court's *comment* on evidence as distinguished from a *wrongful assumption of fact* by the court. Appellant agrees that the trial court has the right to comment and express its opinion on the evidence adduced. *Instruction 4D, however, was not a comment on evidence or an expression of opinion thereon. It constituted a definite assumption of material facts by the trial court which should have been resolved by the jury.*

II.

SECOND POINT RAISED: RULE 30 OF THE FEDERAL RULE OF CRIMINAL PROCEDURE SHOULD NOT PRECLUDE THIS COURT'S CONSIDERATION OF ERRONEOUS INSTRUCTION 4.

In his opening brief (pp. 21-24) appellant cited a great deal of responsible authority showing that an instruction such as that given by the trial court in Instruction 4 constituted prejudicial error. On page 13 of his brief, appellee denies that prejudicial error was made by giving this instruction, but cites no authorities whatsoever to substantiate this position. We may, therefore, assume that this instruction is prejudicial in fact.

Appellant is thoroughly familiar with the authorities cited by appellee under Rule 30 of the Federal Rules of Criminal Procedure and concedes that under

normal proper practice appellant should have specifically objected to this erroneous instruction. His failure to do so, however, does not preclude this Court from considering this prejudicial error, and appellant contends that he is entitled to the benefit of such consideration.

In numerous cases the Federal Appellate Courts have, notwithstanding Rule 30, considered an erroneous prejudicial instruction and reversed convictions where objections were not made by appellant at the trial court.

In *Miller v. U. S.,* 120 Fed. (2d) 968, 972 (C.C.A. 10th), the court said:

> "Where life or liberty is involved, an appellate court may notice and correct a serious error plainly prejudicial, without it being called to the attention of the trial court * * * or even where the error was not preserved for review by proper objection, exception or assignment."

And in *Cave v. U. S.,* 159 Fed. (2d) 464, 469 (C.C.A. 8th), the court said:

> "Notwithstanding this rule (Rule 30) in criminal cases involving life or liberty of a defendant, an appellate court may notice plain and seriously prejudicial error in the trial, even though not assigned as error." (Parenthesis added.)

In *Lindsey v. U. S.,* 133 Fed. (2d) 368, 375 (App. D. C.), the court, in following the same principle and reversing the judgment because the instructions were erroneous and prejudicial, even though there was a failure to seasonably object to the instruction, stated:

> "The crimes with which the appellant is charged are of extremely grave character. * * * No verdict of guilt can properly be reached under our system of law without a trial in which the rights of the defendant which are guaranteed by the law are adequately protected. For the reasons set out above, I think that they were not protected in this case because * * * the instructions were out of balance."

To the same effect:

Meadows v. U. S., 82 Fed. (2d) 881, 884 (App. D. C.);

Kinard v. U. S., 96 Fed. (2d) 522, 526 (App. D. C.);

Wiborg v. U. S., 163 U. S. 632, 658, 16 S. Ct. 1127;

U. S. v. Rappy, 157 Fed. (2d) 964, 967 (C.C.A. 2d).

This Court has likewise disregarded failure of a defendant to object to palpable error in instructions by the trial court. In *Morris v. U. S.,* 156 Fed. (2d) 525, 527 (C.C.A. 9th), where the trial court failed to instruct on certain statutes and regulations and there was no assignment of error made at the trial, this Court nevertheless considered the error and reversed the judgment, stating:

> "In a criminal case, it is always a duty of the court to instruct on all essential questions of law, whether requested or not."

It is thus apparent that this Court has the inherent power, notwithstanding the provisions of Rule 30, to

consider the erroneous Instruction 4 and to reverse the conviction if it is found to be prejudicial.

The crime charged against appellant is certainly a serious one. The penalty meted out was sereve. Appellant earnestly contends that this Court should exercise its inherent power and consider this instruction.

III.

THIRD POINT RAISED: RULE 30 OF FEDERAL RULES OF CRIMINAL PROCEDURE SHOULD NOT BE INVOKED ON THE ISSUE OF SELF-DEFENSE.

Appellee contends that Rule 30 of Federal Rules of Criminal Procedure again precludes appellant from complaining that the trial court failed to instruct on the issue of self-defense. As heretofore pointed out the trial court, by giving Instruction 4D, erroneously removed the issue of self-defense from the jury. Instruction 4D was expressly objected to by appellant. (T. R. 23.) Accordingly it would have been futile for appellant to request an instruction on self-defense when the court had expressly removed that issue from the jury.

Appellee further contends (brief p. 17) that self-defense may not be urged in cases of mutual combat and cites authorities to substantiate this position. He also contends that no claim of self-defense was made by appellant.

Appellant calls the Court's attention to the arguments heretofore presented in this and in his opening

brief to the effect that the issues of mutual combat and self-defense were present in this case and should have been submitted to the jury for a decision in view of the conflicting evidence.

In his brief (p. 18) appellee says:

> "It seems evident that the claim of self-defense, asserted for the first time on appeal, is an afterthought which did not occur until sometime subsequent to the trial."

This assertion is not borne out by the record. In his "Memorandum of Exceptions" (T. R. 22, 23) counsel for appellant stated:

> "And we except to Instruction No. 4-D on the ground that the instruction assumes on its face that the defendant was the aggressor.
> Court: Exception is, of course, noted."

As heretofore pointed out in this brief (p. 2) there is positive testimony in the record that appellee struck the first blow in the altercation. (T. R. 416.)

Appellee further contends (p. 18) that the failure of a court to properly instruct the jury will not be considered on appeal where there was no request made for such instruction or no exception taken to the failure of the court to have so instructed. In support of this contention appellee cites a number of authorities. An examination of the cases cited by appellee shows that they do not constitute authority for appellee's contention.

In *Humes v. U. S.* 170 U. S. 210, the Supreme Court observed that the instruction given by the trial court

was "explicit and unmistakable" and "full and more elaborate than the instruction requested"; the defendant could not very well, therefore, complain that his requested instruction was not given.

In *Springer v. U. S.* 148 Fed. (2d) 411, where the trial court refused to give a requested instruction on good character, it was held unprejudicial because good character was not an issue in the case. *Moreover in this case the court reiterated the rule that it was the duty of the trial court to cover all issues involved, even in the absence of a request.*

As heretofore shown, self-defense is an issue in any case of assault, and certainly was an issue in this case.

Girson v. U. S. 88 Fed. (2d) 358, likewise holds that a defendant cannot complain where all of the issues in the case are covered by proper instructions.

To the same effect:
Goon v. U. S. 15 Fed. (2d) 841;
Skiskowski v. U. S. 158 Fed. (2d) 177.

IV.

FOURTH POINT RAISED: THE GOVERNMENT'S USE OF PHOTOGRAPHS IN THE INSTANT CASE CONSTITUTED ERROR.

Appellee cites and quotes a large number of authorities for the purpose of showing that the trial court's admission in evidence of the photographs depicted in appellant's brief did not constitute error. Appellant has no quarrel with the authorities cited by appellee on this point. Appellant concedes that photographs

may be used for the purpose of showing to the jury the nature and character of an actual wound. However, as pointed out in appellant's opening brief, Exhibits 7, 9 and 10, which were introduced into evidence, exhibited to the jury and then withdrawn before the case was submitted, *were in no way related to the testimony of any witness in the case so as to show the nature or character of the actual wound.*

These three exhibits, which are before this Court for consideration (Appendix, Appellant's Opening Brief) in no way illustrate the nature or character of the wound. All of the photographs were taken during the course of the operation on Rowley's skull; after the large T-shaped incision had been made by the surgeons, and while the resulting wound was open for surgery. An examination of the pictures clearly demonstrates that it would be impossible to ascertain from them either the size, extent or nature of the actual wound alleged to have been inflicted by appellant.

Exhibit 8, which was not withdrawn from the jury, was taken after Rowley's head was sewn up. In addition to purporting to show the length of the wound inflicted in the altercation, it shows the entire extent of the incision made by the doctors in the operation. The alleged original wound is not claimed to be more than 3½ inches in length. The incision made by the surgeons runs from the forehead to the back part of the skull and laterally toward each ear. This exhibit, which the United States attorney chose to leave in evidence, might comply with the ar-

guments advanced and the authorities cited by appellee for the legitimate use of photographs, but under no circumstances can the use of Exhibits 7, 9 and 10 be justified.

Appellee's statement in his brief (p. 29) that the United States Attorney had withdrawn Exhibits 7, 9 and 10 so as not to excite prejudice and horror in the minds of the jury, and his assertion:

> "If, as asserted by appellant, the U. S. Attorney's sole purpose in introducing these photographs was to prejudice the jury, he would have maneuvered to have those protographs flashed before the jury constantly throughout the trial and would have insisted, above everything else, that these photographs be with the jury during their deliberations."

certainly does not reflect a prosecutor's dispassionate presentation of evidence to enlighten the jury as to the nature and character of the wound in question. If the United States Attorney sincerely believed that these exhibits were not prejudicial he would never have withdrawn them from the jury before it commenced its deliberations and assigned therefor the following remarkable reason (Appellee's brief, p. 29):

> "After this evidence had been conveyed to the jury the exhibits were withdrawn prior to the jury's retiring to avoid any possibility of the appellant claiming that the photographs had influenced the jury *during their deliberations.*" (Italics ours.)

V.

FIFTH POINT RAISED: SUFFICIENCY OF THE INDICTMENT AND JURISDICTION OF THE TRIAL COURT OVER THE OFFENSE CHARGED.

The greater portion of the balance of appellee's brief is devoted to refuting appellant's contention that the indictment did not state facts sufficient to constitute a cause of action and that the trial court had, therefore, no jurisdiction over the offense charged. In reply thereto, appellant, in addition to the arguments set forth in his opening brief (pp. 34-65) wishes to comment briefly on some of the authorities cited by appellee for the purpose of showing the Court that these authorities are not applicable to the indictment in the case at bar.

In that portion of appellee's brief designated "An indictment pleading only the words of the statute is sufficient in the case at bar" (pp. 42-54) appellee argues at length that an indictment merely pleading the words of the Alaska Statute is sufficient to charge the offense.*

The authorities he cites do not bear out this contention. In *Jackson v. U. S.* 102 Fed. 473 (Appellee's brief 42-44) the offense charged was assault with a dangerous weapon contrary to the provisions of the Oregon Code which, at that time, was in force in Alaska.

" * * whoever, being armed with a dangerous weapon shall assault another with such weapon." (Sec. 4778, Alaska Compiled Laws.)

The weapon designated in that case was a "revolver charged with gun powder and leaden bullets, and with which a mortal wound could be inflicted."

This indictment charged the use of a dangerous weapon *per se* and was sufficient.

In *State v. Sims* (Appellee's brief 45-46) the alleged dangerous weapon was described in the indictment as a "brick". The defendant contended that the manner in which the brick was used should have been set out in the indictment. The court rejected this theory, stating that a brick was as much an allegation of a dangerous weapon as would be an "axe, hoe, pistol, or other lethal weapon". There is a substantial difference between describing an alleged dangerous weapon as a brick and describing it as a "long-handled implement".

In *People v. Moore,* 57 N.E. (2d) 511 (Appellee's brief 51) the alleged dangerous weapon is described as "the tines of a pitchfork". Thus the indictment particularly described a dangerous weapon.

In *Alyea v. State,* 86 N.W. 1066 (Appellee's brief 52, 53) the only offense charged was *assault.* No battery was committed and therefore no question of the use of a dangerous weapon was involved.

In *State v. Knight,* 289 Pac. 1053, 1054 (Appellee's brief 53) the alleged dangerous weapon was described as "a hardwood leaded cane or walking stick" and further alleged that the instrument was used by the defendant by striking about the head and face there-

with. In holding this indictment sufficient, the court stated:

> "We think it affirmatively appears that the hard-wood leaded cane, when used in beating a person about the head and face, was capable of producing death or great bodily harm."

In the *Knight* case the Court cited another Oregon case *(State v. Linville)* in which the alleged dangerous weapon was described as an electric flash light about a foot long and two pounds in weight. No Oregon case has been cited nor has appellant been able to find any that dispensed with the necessity of a description of the weapon, which, coupled with its use, would show it to be dangerous on the face of the indictment.

Appellee cites several California cases holding that a description of the offense, couched in the language of the statute, is sufficient and that a more particular description of the alleged weapon or the manner of its use is not required. The California cases are unique in this respect. As far back as 1865, in *People v. King,* 27 Cal. 507, it was held

> "In an indictment for murder it is not necessary to aver the means by which the murder was committed, or the nature and extent of the wound."

Compared to the particularity required in Federal indictments as set forth in *U. S. v. Cruikshank,* 92 U. S. 542; 23 L. Ed. 588, and cases following, as cited in appellant's opening brief (pp. 55-62) the following language of the California Court in the *King* case, supra, is remarkable:

> "If the defendant is guilty, he stands in need of no information to be derived from a perusal of the indictment, as to the means used by him in committing the act or the manner in which it was done, for as to both his own knowledge is quite as reliable as any statements contained in the indictment. If he is not guilty, the information could not aid in the preparation of his defense."

The later California cases cited by appellee *(People v. Petters,* 84 Pac. (2d) 54, and *People v. Mecias,* 174 Pac. (2d) 895) were decisions after the amendments of 1927 and 1929 to Section 952 of the Penal Code of California. In these cases the court said that the amendments to the code enabled the prosecution to plead the offense merely in the terms of the statute.

Other western states, particularly Idaho, follow the California rule, but these cases do not constitute the weight of the authority and certainly are not applicable to the Federal Rule as embodied in the *Cruikshank* case, supra, and the cases following thereunder.

The Compiled Laws of Alaska of 1933 provide (Sec. 5211) that the indictment must be true and certain as regards:

> First: The party charged;
> Second: The crime charged;
> Third: The particular circumstances of the crime charged when they are necessary to constitute the complete crime.

Rule 7(c) of the Federal Rules of Criminal Procedure provides that the indictment "shall be a plain,

concise and definite written statement of the essential facts."

The above authorities, all cited by appellee, cannot change the fundamental rule, in Federal procedure at least, that the indictment must go further than the words of the statute and define the nature of the alleged weapon used and the manner of its use. The indictment in the instant case merely informs defandant that he, being armed with a long-handled implement, assaulted Rowley with said implement by striking, beating and wounding his head. No other facts are alleged to show that the "implement" was dangerous either in use or *per se*.

Nor can it be said that the use of the word "wounding" in the indictment cures the defect in the description of the alleged weapon. As stated, the indictment alleges that "defendant***with a long-handled implement, assaulted Rowley with said implement by striking, beating and *wounding* his head". (Italics ours.)

The definition of "wound" in criminal cases is an injury to the person by which the skin is broken.

State v. Leonard, 22 Mo. 449, 451.

> "A wound is an injury to the body of a person or an animal, especially one caused by violence, by which the continuity of the covering, as skin, mucous membrane, or conjuctiva, is broken."
>
> *Casperino v. Prudential Insurance Co. of America* (Mo.) 107 S.W. (2d) 819, 827.

To constitute a "wound" within the meaning of the West Virginia Code, there must be a complete parting of the external or internal skin.

State v. Gibson, 67 W. Va. 548; 68 S.E. 295; Words and Phrases, pp. 548, 549, 551.

So, in this case, the information furnished to the defendant by the indictment is that he struck, beat and wounded the head of Frank Rowley to the extent of "breaking the skin".

There is no allegation that Frank Rowley was dangerously or seriously injured or that he could have been.

Aside from the use of the word "dangerous" in the indictment, which as has been shown as a mere conclusion of the pleader, there is nothing alleged in the indictment to show the use of a dangerous weapon.

On page 39 of appellee's brief, after the indictment is quoted, it is stated "the facts were alleged and set forth in such detail that if proven the accused could not be innocent."

We submit that proof that the defendant assaulted Frank Rowley with a broom or umbrella or any one of many long-handled implements, and thereby inflicted a slight injury breaking the skin, would meet all of the allegations of the indictment but would not be any proof whatever of an assault with a dangerous weapon, and in such case, while the accused might not be innocent of assault and battery, he would be innocent of the charge for which he has been convicted.

It is elementary that the facts charged must be inconsistent with innocence.

"Such facts must be alleged that if proved, the defendant cannot be innocent."

31 *C. J.* Sec. 265, p. 713.

"A conviction cannot be sustained where all the facts stated in the indictment might be true and still accused might not be guilty of the offense intended to be charged."

31 *C. J.* Sec. 238, p. 693.

"It is a cardinal rule of criminal pleading that an indictment must portray all the facts that constitute the crime sought to be charged so that the Court from an inspection of the indictment can say that, if all the facts alleged are true, the defendant is guilty."

State v. Beliveau (Maine) 96 Atl. 779, 780.

Even where a doubt exists as to whether an information or indictment charges a felony or misdemeanor, the offense should be held to be a misdemeanor.

Bowers v. State, 127 Pac. 883; 8 Okla. Cr. 277.

Here we have an indictment in which the facts charged are not only consistent with the innocence of the defendant of the crime charged, but if conclusively proven would not establish his guilt.

It is a general rule that no presumption is indulged in favor of a criminal pleading. While evidence might be introduced in support of the indictment which would prove the use of a dangerous weapon, the suffi-

ciency of the indictment itself does not depend upon evidence adduced in its support, but upon its contents.

Neither can it be aided by what the defendant may or may not have learned at the preliminary hearing or the various ways mentioned on pages 41 and 42 of appellee's brief. The sufficiency of the indictment must be determined by its contents, whether it be an indictment returned after a preliminary hearing or one originating with the grand jury.

On page 42 of appellee's brief, after reciting various sources of information available to the defendant, is the following statement:

> "In this connection it seems appropriate to note the language of the Court in *United States v. Lynch,* 11 Fed. (2d) 298, 300:
>
> 'Undoubtedly neither the district attorney nor the grand jury is required to allege facts which are unknown, especially such as should be from the very circumstances of the case best known to the accused.' "

But appellee neglected to recite the remainder of the quoted extract which is as follows:

> "But they must allege facts sufficient to constitute a crime, including such facts as are known, to the end that the defendant may know what he is to meet and to serve as the basis of either a plea of autrefois acquit or autrefois convict, as to further charges." Citing *U. S. v. Rhodes,* 212 Fed. 517 and other cases heretofore cited by appellant.

VI.

SIXTH POINT RAISED: EVIDENCE WAS WITHHELD FROM THE GRAND JURY WHICH PREVENTED THE GRAND JURY FROM RETURNING A VALID INDICTMENT.

Appellant's position on this point is fully set forth in his opening brief (pp. 66-73).

Appellee's argument that the grand jury, which returned the indictment in question, was justified in refusing to hear the testimony of Miles as to the character of the weapon and therefore returned an indictment describing the alleged weapon as a

> "long-handled implement, a more exact description of said long-handled implement being to the Grand Jury unknown and therefore not stated". (T.R. 2, 332.)

seems to be based on the United States Attorney's position that *he* was unable to describe the alleged weapon until after an experiment performed on the first day of the trial.

As set forth in appellant's opening brief (pp. 66-75) all of the testimony concerning the accident was in the Government's possession or available to the Government from July 30, 1946, to November 5, 1946, the latter date being the first day of the trial. There is no reason assigned as to why the experiments performed by the United States Attorney on the opening day of the trial, to determine the type of weapon used, could not have been performed by him immediately after the accident. As stated, all of the evidence was then in the possession of the Government. All of this in-

formation, including the testimony of Miles, should have been laid before the grand jury to enable it to determine the nature of the alleged weapon used. Appellant earnestly contends that the judgment or opinion of the United States Attorney should not be substituted for the knowledge of the grand jury. Miles, whose testimony was not heard by the grand jury, testified that the weapon used was a rake. The United States Attorney, after an experiment on the first day of the trial, concluded that the implement used was a rake. If the testimony of Miles and an experiment by the United States Attorney had been laid before the grand jury, it is very probable that they too would have concluded that the implement in question was a rake and not an implement "a more exact description***being to the Grand Jury unknown and therefore not stated".

It is pointed out in appellant's opening brief (pp. 66-73), an allegation containing a recital "which is to the Grand Jury unknown" is permissible only where such knowledge could not have been obtained by the grand jury by the exercise of reasonable diligence. The use of such an allegation without recourse to knowledge and information in the hands of the officers of the Government and subject to the inspection of the grand jury renders an indictment containing such a statement invalid.

U. S. v. Aurandt, 15 N.M. 292; 107 Pac. 1064, 1066.

Appellant respectfully submits that the julgment of conviction herein should be reversed.

Dated, San Francisco, California,
October 1, 1948.

Respectfully submitted,
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